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MEMORANDUM

To: Members of the Subcommittee on National Security, Emerging
Threats, and International Relations

From: Christopher Shays 
Chairman

Date: March 24, 2006

Re: Briefing memo for March 28 Subcommittee hearing.

Attached find the briefing memo required by Committee rules
for the hearing entitled *Setting Post-9/11 Investigative
Priorities at the Bureau of Immigration and Customs
Enforcement*. The hearing will convene March 28, 2006 at
2:00p.m., room 2247 Rayburn House Office Building in
Washington, D.C.

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March 24, 2006

MEMORANDUM

To: Members of the Subcommittee on National Security, Emerging
Threats, and International Relations

From: Elizabeth Daniel, Professional Staff **ED**

Re: Briefing memo for the hearing *Setting Post-9/11 Investigative
Priorities at the Bureau of Immigration and Customs
Enforcement*, scheduled for March 28, 2006 at 2:00p.m., room
2247 Rayburn House Office Building in Washington, D.C.

PURPOSE OF THE HEARING

To examine how investigative priorities are set at the Department of
Homeland Security (DHS) Bureau of Immigration and Customs
Enforcement (ICE), given its various and sometimes competing missions
including national security, financial investigations, narcotics smuggling,
immigration affairs, and human trafficking.

HEARING ISSUES

1. How does ICE determine investigative priorities?
2. To what extent does national security factor among ICE investigative
priorities?

BACKGROUND

The Department of Homeland Security (DHS) Bureau of Immigration and Customs Enforcement (ICE), created in March 2003, is charged with prevention of acts of terrorism by targeting the people, money, and materials that support terrorist and criminal activities. The Bureau is responsible for identifying and shutting down vulnerabilities in the nation's border, economic, transportation and infrastructure security. (**Web Resource 1**) While national security is a designated priority for ICE, the percentage of investigations devoted specifically to national security has come under scrutiny. The Government Accountability Office (GAO) and the DHS Inspector General (IG) found in separate reports evidence that ICE needs to factor national security into its work more effectively.

Formation and Infrastructure of ICE

On November 25, 2002, President Bush signed into law the Homeland Security Act (HSA) of 2002 (P.L. 107-296). (**Web Resource 2**) The Act merged nearly 180,000 employees at twenty-two agencies into what was envisioned as a single, cohesive unit able to address effectively issues of national security in the United States. This merge drastically overhauled pre-existing immigration functions and reorganized them into two new agencies: ICE and Customs and Border Protection (CBP).

ICE took on investigations and intelligence functions that had been the purview of the Immigration and Naturalization Service (INS, formerly under the Department of Justice) and U.S. Customs Service (USCS, formerly under the Treasury Department). ICE also acquired INS detention and removal staff and resources. CBP took over INS and USCS inspections functions and the Border Protection. Other entities controlled other immigration-related activities: the Department of State retained control over the issuance of visas; the Secretary of Homeland Security would have authority over visa issuance regulations. Other agencies, among them the Department of Health and Human Services, the Federal Bureau of Investigations (FBI), and the Drug Enforcement Administration (DEA), are responsible for other immigration functions.

ICE is the largest investigative bureau of DHS, comprised of four divisions: the Office of Investigations, the Office of Intelligence, the Office of

Detention and Removal Operations, and the Office of Federal Protective Service. The Office of Investigations includes the National Security Division, Investigative Services Division, Financial and Trade Division, Mission Support Division, and Smuggling and Public Safety Division. (**Attachment 1**, organizational chart)

Before the 9/11 attacks, the main categories of crimes investigated by immigration authorities included suspected criminal acts, suspected fraudulent activities (such as possessing or manufacturing fraudulent immigration documents), suspected smuggling and trafficking of aliens, and suspected work site violations (such as illegal workers, and employers knowingly hiring illegal workers). These legacy functions of the department remained intact under DHS, but each division now is charged with incorporating and prioritizing national security into those legacy functions, and liaising closely with component DHS and outside agencies also involved in counterterrorism. (**Web Resource 2**) Since its inception, ICE was tasked with counterterrorism as a primary objective.

Responsibility for immigration-related counterterrorism investigations also resides in outside agencies including the DEA, FBI (responsible for terrorist financing investigations), and others with whom ICE was to cooperate. Joint Terrorism Task Forces (JTTFs) are mechanisms designed to facilitate interagency coordination, and are open to representatives from all law enforcement agencies. Spread throughout the United States, they serve as interagency coordinators in terrorism investigations and are comprised of representatives from state and local law enforcement agencies and federal agencies which share relevant information.

In the past year, oversight reports by the GAO and the DHS Inspector General have highlighted concerns about operational effectiveness at ICE. Among the issues they raise, information sharing, interagency cooperation, jurisdictional turf battles, employee morale, and lack of resource allocation models all attracted scrutiny. It is unclear whether ICE has in fact succeeded in ranking national security among investigative priorities.

2005 GAO report: Homeland Security: Better Management Practices Could Enhance DHS's Ability to Allocate Investigative Resources
(Attachment 2)

At the request of Chairman Shays and Rep. Christopher Cox, then-Chairman of the Committee on Homeland Security, the GAO conducted an investigation into the ICE Office of Investigations (OI) investigative priorities. This inquiry found several areas of operation where practices needed improvement in order to better serve the goal of national security.

- Investigative activities at ICE generally relate to legacy missions because the OI infrastructure still reflects legacy agency makeup. A large share of funds in fiscal year 2004 and the first half of fiscal year 2005 (the time period covered by the report) were devoted to cases involving drugs, financial crimes, and general alien investigations. Despite the broad definition of what cases may contain a national security nexus, a significantly smaller share of investigative hours were directed to national security.
- Furthermore, the investigative resources in place were not used effectively. The GAO reports that of the percentage of resources devoted to cases with a national security nexus, roughly half were used to identify incarcerated criminal aliens eligible for deportation, a task that could be performed by staff with lesser qualifications. In addition, OI investigators perform worksite enforcement and further focus on civil and administrative violations that take them away from the criminal investigations for which they are uniquely qualified.
- The allocation of investigative resources is affected by the lack of a comprehensive risk assessment of the customs and immigration system. Such a risk evaluation would help determine the greatest potential areas for exploitation and, by extension, make investigations more proactive. The GAO found that OI determines reactively whether cases already in front of them have a national security nexus rather than actively seeking out national security investigations.

2005 DHS Office of the Inspector General (OIG) Report: *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*¹ (Web Resource 4)

¹ This report was issued following an investigation at the request of Senate Committee on Homeland Security and Government Affairs Chairman Susan Collins at a January 2005 hearing.

The Office of the Inspector General found that work by ICE on a day-to-day basis is further affected by competing jurisdictions among different agencies, turf issues, lack of interagency coordination, and a lack of clear channels to facilitate information sharing.

- ICE and CPB functions have been divided in a way counterintuitive to the smooth progression of a case investigation. Enforcement efforts initiated by CBP now must be completed by ICE. ICE investigations depend upon case referrals from CBP inspectors, and CBP border agents rely on ICE detention and removal resources to deport the aliens they apprehend. Interagency cooperation has been hampered by a lack of authority to integrate CBP and ICE from the top down.
- Partly because of failed interagency communication resulting from this lack of coordination, ICE and CPB developed their own “stovepipes” for intelligence analysis, resulting in duplicative efforts and growing interagency antagonism.
- A resource imbalance resulting from CPB “front-end apprehension” has created a backlog of cases referred to ICE for investigation and detention and removal capability.
- ICE encountered unclear jurisdiction with the FBI in terrorism financing investigations. In May 2003, ICE and the FBI signed a Memorandum of Agreement (MOA). (See **Web Resource 5** for an overview of its provisions and **Web Resource 6** for FBI testimony on the MOA.) However, there has been evidence since the issuance of the MOA that interagency cooperation remains less than ideal. Other Memoranda of Agreement or Understanding with different agencies and U.S. government entities have met with similarly mixed outcomes.

According to *DHS 2.0: Rethinking the Department of Homeland Security*, a further consequence of the sea changes surrounding the creation of DHS is a significant loss of key personnel. During the first year of operation, Chief Information Officers heading DHS divisions experienced 45 percent turnover. This staffing instability is further exacerbated by the relative newness of the organization, the lack of a senior management team already

in place, internal turf conflicts, and a large number of new initiatives.
(Attachment 3)

To assess and ultimately help repair the intricacies affecting ICE investigative priorities and broader DHS concerns, the report further recommends that Congressional oversight be consolidated in the House and Senate in single committees, plus "an enhanced recommitment to intelligence oversight on the part of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence."
(Attachment 3)

DISCUSSION OF HEARING ISSUES

3. How does ICE determine investigative priorities?

The Investigative Path

The ICE Office of Investigations typically receives leads from related offices around the country. Leads may originate with other ongoing investigations, be culled from local intelligence sources, come from overseas or from headquarters, be referred from CBP, or emerge from channels related to legacy functions. Once investigators have a case in hand, they consider whether it has a national security nexus and proceed based upon that determination. Most investigations by ICE ultimately relate to the legacy missions whose cases did not include a national security nexus including drugs, financial crimes, and general alien investigations.
(Attachment 2)

Employee Effects on Investigations

According to present employees at ICE and related agencies, ICE investigative priorities are often negatively influenced by interpersonal circumstances, aggravated by organizational faults that result from the dust settling around the creation of DHS.

Interagency collaboration suffers from deteriorating interpersonal cooperation. CBP inspectors and Border Patrol agents have been sending cases to other law enforcement agencies rather than to ICE because of a perceived lack of responsiveness. ICE investigators counter that CBP is increasing its own investigative work and infringing upon areas of ICE responsibility. Further, dual chains of command at ICE and at CPB—as opposed to a single central authority at the former INS—prevent the integration of agencies' employees. Workers predict that eventual turnover of current senior staff will further undermine interagency cooperation.

Though ICE and the FBI, Department of State, CBP, and other agencies have entered into MOAs and MOUs, many insiders view these documents as time consuming and inadequate for concretely defining separation of responsibilities, sharing of information, and facilitating work. Paper

agreements are not considered reliably effective for coordinating interagency cooperation, nor in the case of immigration-related enforcement are they wide-ranging and flexible enough to adapt to an evolving department.

External Reactions

A new mandate to focus on national security at ICE has led to the perception that in certain circumstances investigators have gone too far.

In 2004 testimony before the Subcommittee on National Security, Emerging Threats, and International Relations, Robert Schoch stated, "Visa revocation investigations are a priority for ICE, and we are committed to thoroughly investigating all referrals from the State Department." (**Web Resource 7**) Some believe that ICE investigations of this sort cast the net too wide, engaging in illegitimate profiling and targeting the wrong people whose cases then become public causes.

A highly publicized ACLU lawsuit launched in January 2006 charges that Section 411 of the Patriot Act (**Web Resource 8**) excludes people from the United States who do not pose a genuine threat, based purely upon the ideologies they espouse. Dr. Tariq Ramadan, a Swiss citizen widely regarded as a leading scholar of the Muslim world, is at the center of the lawsuit. (**Attachment 4**) The ACLU charges that in denying Ramadan the visa that has kept him from numerous speaking engagements in the United States, the U.S. government "is violating the rights of Americans to hear constitutionally protected speech."

In March 2006 the ACLU requested that a federal court prevent the Departments of State and Homeland Security from keeping Dr. Ramadan out of the country. This case leads to the issue of profiling, and its proper role, if any, in the investigations of the Bureau of Immigration and Customs Enforcement. U.S. visa policy has received a great deal of attention as it is widely viewed as so exclusionary that key individuals with unique intellectual and technical skills are choosing to be educated and reside in countries other than the United States. (**Web Resource 9; Attachment 3**)

4. To what extent does national security factor among ICE investigative priorities?

According to the GAO, ICE OI devotes a small percentage of investigative hours to national security investigations. To some, this implies that national security is ranked low among investigative priorities. Only operational for three years, ICE OI continues to rely on a legacy infrastructure for present operations, and could do more to incorporate national security into its investigative priorities.

However, other mitigating factors suggest a different perspective. First, according to the GAO, OI defines national security interest so broadly that the category is potentially applicable to virtually all OI activities. This makes it difficult to track to what extent ICE treats national security explicitly as an investigative priority. Furthermore, as the largest investigative arm of DHS, ICE is responsible for a wide array of investigative areas in which national security may not always be measurably distinct from legacy missions.

Second, while national security is in fact a high investigative priority on paper, in practice the mechanisms are not yet in place to assess needs and devote appropriate resources. ICE OI has yet to conduct a comprehensive risk assessment study which would integrate threats, vulnerabilities, and consequences in order to make more efficient resource allocation decisions. Risk assessment also would allow ICE to be more proactive in seeking out national security cases, rather than determining retroactively whether a national security nexus exists for cases already in the system.

Risk assessment would further contribute to efficient monitoring and evaluation by facilitating the use of outcome-based performance measures. Law enforcement and investigatory agencies are often opposed to such concrete measurement of output, in part because investigations may produce intangible results. However, it is argued that goal setting will help clarify objectives and focus investigatory efforts at ICE.

Third, the extent to which ICE ranks national security is skewed by jurisdictional overlaps and agency turf wars in counterterrorism work. The DHS IG reports that internecine competition and case hoarding were already compromising national security investigations at ICE and other government

agencies. ICE would be better able to allocate its investigative resources with improved interagency cooperation helping to focus the flow of information, institutionalize information sharing, and harmonize different information systems. Though the value of MOUs and MOAs is subject to debate, some suggest that they form a commonly agreed-upon basis for navigating jurisdictional boundaries.

Given these circumstances, it may be difficult to produce a true measure of the rank of national security among ICE investigative priorities. But there is clear room for improvement, and the overall cost of organizational change is less now than it will be when DHS ICE is more settled. The *DHS 2.0* report allows that "the successful transformation of a large organization takes five to seven years." (**Attachment 3**) With DHS now entering its fourth year, its internal structure and capacity for change are greater now than they will be once staffing turnover slows, budgets are concretized, and practices are more firmly institutionalized.

WITNESS TESTIMONY

Witnesses were told that the hearing will be based on the Government Accountability Office (GAO) report *Homeland Security: Better Management Practices Could Enhance DHS's Ability to Allocate Investigative Resources. (Attachment 2)*

Mr. Richard M. Stana is expected to discuss his work on the GAO report. In particular, he is expected to discuss GAO findings on investigative priorities at ICE.

Mr. Richard L. Skinner has been asked to discuss interagency coordination, explain the rationale for separating inspection functions from investigative functions, and detail the effect this has had on ICE output and on its employees. He is also expected to comment on how this may affect broader investigative priorities at the Bureau of Immigration and Customs Enforcement.

Mr. Robert Schoch has been asked to discuss how ICE determines investigative priorities, and to what extent national security factors among them.

Dr. Joseph Ryan is expected to speak about the benefits of the application of risk management and outcome-based performance measurements in the interest of national security, and offer recommendations specific to the Bureau.

Ms. Caroline Fredrickson has been asked to describe work by the ACLU on ICE investigations involving revoked visas and other status changes that can be construed as ideological exclusions. She is also expected to provide observations on the repercussions of these investigative pursuits on the ability of ICE to effectively pursue threats to U.S. national security.

Mr. Joseph Webber has been asked to describe his experiences working as a Special Agent-in-Charge (SAC) in ICE, and in particular his experiences with investigative priorities of the Bureau, allocation of investigative resources, and interagency cooperation.

WITNESSES

PANEL ONE

Mr. Richard M. Stana

Director, Homeland Security and Justice Issues
U.S. Government Accountability Office

Mr. Richard L. Skinner

Inspector General
U.S. Department of Homeland Security

Mr. Robert Schoch

Deputy Assistant Director
National Security Division
ICE Office of Investigations
U.S. Department of Homeland Security

PANEL TWO

Dr. Joseph Ryan

Chair and Professor of Criminal Justice and Sociology
Pace University

Ms. Caroline Fredrickson

Director
ACLU Washington Legislative Office

Mr. Joseph Webber

Special Agent-in-Charge (Retired)
Bureau of Immigration and Customs Enforcement
U.S. Department of Homeland Security

ATTACHMENTS

1. Illustration: ICE Office of Investigations Organizational Structure. U.S. Government Accountability Office, November 2005.
2. *Homeland Security: Better Management Practices Could Enhance DHS's Ability to Allocate Investigative Resources*, U.S. Government Accountability Office, GAO-06-48SU. [Copy of summary page. A complete version of this report, marked Law Enforcement Sensitive, is available for Member and Staff review in Rayburn B-372.]
3. *DHS 2.0: Rethinking the Department of Homeland Security*. David Heyman and James J. Carafano, Ph.D. Center for Strategic and International Studies and The Heritage Foundation, December 13, 2004.
4. *A Visa Revoked*. Editorial, The Washington Post. September 7, 2004.

WEB RESOURCES

1. Immigration and Customs Enforcement bureau organization
<http://www.ice.gov/graphics/about/organization/>
2. The Homeland Security Act (PL 106-296)
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ173.107
3. *Homeland Security Proposals: Issues Regarding Transfer of Immigration Agencies and Functions*. United States Congressional Research Service, CRS RL31560, February 2003.
<http://www.congress.gov/erp/rl/pdf/RL31560.pdf>
4. *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*. U.S. Department of Homeland Security Office of Inspector General, OIG-06-04, November 2005.
http://www.dhs.gov/interweb/assetlibrary/OIG_06-04_Nov05.pdf

5. Abstract, *Investigations of Terrorist Financing, Money Laundering, and Other Financial Crimes*. U.S. Government Accountability Office, GAO-04-464R, February 2004.
<http://www.gao.gov/docsearch/abstract.php?rptno=GAO-04-464R>
6. Congressional Testimony of Michael F.A. Morehart Before the Congressional Committee of Government Reform Subcommittee on Criminal Justice, Drug Policy, and Human Resources, May 11, 2004.
<http://www.fbi.gov/congress/congress04/morehart051104.htm>
7. Testimony of Robert Schoch, Deputy Assistant Director for Immigration and Customs Enforcement, U.S. Department of Homeland Security, before the House Committee on Government Reform Subcommittee on National Security, Emerging Threats, and International Relations, July 13, 2004.
<http://reform.house.gov/UploadedFiles/Schoch%20Testimony.pdf>
8. The USA PATRIOT Act (PL 107-56)
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf
9. ACLU Press Release: *ACLU Asks Federal Court to Lift Visa Ban on Tariq Ramadan*, March 15, 2006.
<http://www.aclu.org/safefree/general/24554prs20060315.html>